

921 (currently under the 2011 edition of NFPA 921) is clear including the mentioning of case law that parties should be allowed to participate to prevent spoliation (Chapter 11 is the legal chapter:

**11.3.5 Spoliation of Evidence.** Spoliation of evidence refers to the loss, destruction, or material alteration of an object or document that is evidence or potential evidence in a legal proceeding by one who has the responsibility for its preservation. Spoliation of evidence may occur when the movement, change, or destruction of evidence, or the alteration of the scene significantly impairs the opportunity of other interested parties to obtain the same evidentiary value from the evidence, as did any prior investigator.

**11.3.5.1 Responsibility.** The responsibility of the investigator (or anyone who handles or examines evidence) is evidence preservation, and the scope of that responsibility varies according to such factors as the investigator's jurisdiction, whether he or she is a public official or private sector investigator, whether criminal conduct is indicated, and applicable laws and regulations. However, regardless of the scope and responsibility of the investigation, care should be taken to avoid destruction of evidence.

**11.3.5.2 Documentation.** Efforts to photograph, document, or preserve evidence should apply not only to evidence relevant to an investigator's opinions, but also to evidence of reasonable alternate hypotheses that were considered and ruled out.

**11.3.5.3 Remedies for Spoliation.** Criminal and civil courts have applied various remedies when there has been spoliation of evidence. Remedies employed by the courts may include discovery sanctions, monetary sanctions, application of evidentiary inferences, limitations under the rules of evidence, exclusion of expert testimony, dismissal of a claim or defense, independent tort actions for the intentional or negligent destruction of evidence, and even prosecution under criminal statutes relating to obstruction of justice. Investigators should conduct their investigations so as to minimize the loss or destruction of evidence and thereby to minimize allegations of spoliation.

**11.3.5.4 Notification to Interested Parties.** Claims of spoliation of evidence can be minimized when notice is given to all known interested parties that an investigation at the site of the incident is going to occur so as to allow all known interested parties the opportunity to retain experts and attend the investigation. Such notice may be made by telephone, letter, or e-mail. Oral notification should be confirmed in writing. Notification should include the date of the incident; the nature of the incident; the incident location; the nature and extent of

loss; damage, death, or injury to the extent known; the interested party's potential connection to the incident; next action date; circumstances affecting the scene (such as pending demolition orders or environmental conditions); a request to reply by a certain date; contact information as to whom the notified person is to reply; and the identity of the individual or entity controlling the scene. The notification should also include a roster of all parties to whom notice has been provided. Public sector investigators may have different notification responsibilities than the private sector investigators. Responsibility for notification varies based on jurisdictions, scope, procedures, and the circumstances of the fire. Interested parties should make public officials aware of their interest. A private sector consent to search does not constitute notice unless it conforms with this section.

**11.3.5.5 Documentation Prior to Alteration.** Anytime the investigator determines that significant alteration of the fire scene will be necessary to complete the fire investigation, it should be done, only after notification to all known interested parties has been given, and the interested parties have been afforded the opportunity to be present. Special care should be taken to photograph and document the scene and preserve relevant evidence. The scene should be properly documented prior to any alteration, and relevant evidence should be preserved. Destructive disassembly of any suspected or potential ignition sources should be avoided whenever possible to permit later forensic examination after notice is given to all known interested parties.

**11.3.5.6 Alteration and Movement of Evidence.**

**11.3.5.6.1** Fire investigation usually requires the movement of evidence or alteration of the scene. In and of itself, such movement of evidence or alteration of the scene should not be considered spoliation of evidence. Physical evidence may need to be moved prior to the discovery of the cause of the fire. Additionally, it is recognized that it is sometimes necessary to remove the potential causative agent from the scene and even to carry out some disassembly in order to determine whether the object did, in fact, cause the fire, and which parties may have contributed to that cause. For example, the manufacturer of an appliance may not be known until after the unit has been examined for identification. Such activities should not be considered spoliation.

**11.3.5.6.2** Still another consideration is protection of the evidence. There may be cases where it is necessary to remove relevant evidence from a scene in order to ensure that it is protected from further damage or theft. Steps taken to protect evidence should also not be considered spoliation.

**11.3.5.7 Notification Prior to Destructive Testing.** Once evidence has been removed from the scene, it should be maintained and not be destroyed or altered until others who have a reasonable interest in the matter have been notified. Any destructive

testing or destructive examination of the evidence that may be necessary should occur only after all reasonably known parties have been notified in advance and given the opportunity to participate in or observe the testing. This section is not intended to apply to evidence collected as part of a criminal investigation. Once the evidence is no longer required for a criminal investigation it should be appropriately released. Guidance regarding notification can be found in ASTM E 860, *Standard Practice for Examining and Testing Items That Are or May Become Involved in Litigation*, and ASTM E 1188, *Standard Practice for Collection and Preservation of Information and Physical Items by a Technical Investigator*. Guidance for disposal of evidence may be found in Section 16.11 of this guide. Guidance for labeling of evidence can be found in ASTM E 1459, *Standard Guide for Physical Evidence Labeling and Related Documentation*.

NFPA 921 is clear; the entire scene should be considered evidence:

## **16.2 Physical Evidence.**

**16.2.1** Physical evidence, defined generally, is any physical or tangible item that tends to prove or disprove a particular fact or issue. Physical evidence at the fire scene may be relevant to the issues of the origin, cause, spread, or the responsibility for the fire.

**16.2.2\*** The decision on what physical evidence to collect at the incident scene for submission to a laboratory or other testing facility for examination and testing, or for support of a fact or opinion, rests with the fire investigator. This decision may be based on a variety of considerations, such as the scope of the investigation, legal requirements, or prohibition. (*See Section 13.2.*) Additional evidence may also be collected by others, including other investigators, insurance company representatives, manufacturer's representatives, owners, and occupants. The investigator should also be aware of standards and procedures relating to evidentiary issues and those issues related to spoliation of evidence.

## **16.3\* Preservation of the Fire Scene and Physical Evidence.**

**16.3.1 General.** Every attempt should be made to protect and preserve the fire scene as intact and undisturbed as possible, with the structure, contents, fixtures, and furnishings remaining in their pre-fire locations. Evidence such as the small paper match shown in Figure 16.3.1 could easily be destroyed or lost in an improperly preserved fire scene.

**16.3.1.1** Generally, the cause of a fire or explosion is not known until near the end of the investigation. Therefore, the evidentiary or interpretative value of various pieces of physical evidence observed at the scene may not be known until, at, or near the end of the fire scene examination, or until the end of the complete investigation. As a result, the entire fire scene should be considered physical evidence and should be protected and preserved. Consideration should be given to temporarily placing

removed ash and debris into bags, tarps, or other suitable containers labeled as to the location from which it was removed. This way, if components from an appliance or an incendiary device are found to be missing they can be more easily found in a labeled container.

As you know, Chapter 27 deals specifically with large loss and allowing others to participate:

## **Chapter 27 Management of Complex Investigations**

**27.1 Scope.** This chapter addresses those issues that are unique to managing investigations that are complex due to size, scope, or duration. Complex investigations generally include multiple simultaneous investigations and involve a significant number of interested parties. A complex investigation may arise from a fire or explosion incident that involves circumstances such as fatalities or injuries, fires in high-rise buildings, large complexes or multiple buildings, or fires and explosions in industrial plants or commercial properties, but may not always be large in size or magnitude. The methodology of this chapter may be applied to other investigations not considered complex.

### **27.1.1 Governmental Inquiry.**

**27.1.1.1** Public sector agencies that have jurisdiction for investigating an incident are governed by their jurisdictional legislative and statutory authority, laws, regulations, rules and policies; therefore, the methodology of this chapter may not pertain in its entirety to their investigations.

**27.1.1.2** It is understood that the governmental entities having public safety authority and responsibility normally conduct an initial investigation. The officials who conduct the governmental investigation should attempt to follow industry standards and guidelines and preserve (or leave in place) the physical evidence in order that interested parties may have the opportunity conduct a complex investigation as set forth in this chapter. Government investigators may find it necessary to alter evidence during the various missions of the agencies. Evidence should not be altered, damaged, or destroyed unless doing so is unavoidable and furthers the purpose of the various missions of the agency. If evidence must be altered in some way, public authorities should consider consulting with other interested parties so as not to impair the integrity of the public investigation. The governmental investigators should document their investigation. At the point that there are no longer significant public safety issues or the investigators have determined that their inquiry is not a criminal investigation, the governmental investigators may choose to participate in the complex investigation process or terminate their inquiry.

**27.1.2 Intent.** This chapter is intended to provide a framework for the management of complex investigations. The use of the term investigation in the singular in this chapter refers to the multiple simultaneous investigations conducted by the interested parties. The degree to which the guidelines in this chapter apply will vary depending on the specific incident.

**27.1.3 Purpose.** The purpose of this chapter is to provide guidance for the management and coordination of investigative activities among multiple interested parties, which affords an opportunity for all to investigate the incident, to protect their respective interests, and to allow for cost-effective and expeditious investigations. It is not the purpose of this chapter to instruct interested parties how to investigate the incident. The organization of investigative teams, functions, and activities are provided in Chapter 14. The scene examination should be conducted according to the principles recommended in this guide.

**27.1.4 Interested Parties.** As used in this document, “interested parties” means any person, entity, or organization, including their representatives, with statutory obligations or whose legal rights or interests may be affected by the investigation of a specific incident. Interested parties may include persons or groups conducting fire or explosion investigations on behalf of public safety agencies (such as fire departments, law enforcement, fire marshals, code enforcement agencies, or criminal prosecutors), property owners, or existing or potential parties to civil or criminal litigation and their attorneys (such as insurance interests, fire victims, and criminal defendants or potential criminal defendants).

#### **27.1.5 Chapter Definitions.**

**27.1.5.1 Interested Party.** Any person, entity, or organization, including their representatives, with statutory obligations or whose legal rights or interests may be affected by the investigation of a specific incident.

**27.1.5.2 Investigation Site.** For the purpose of this chapter, the terms “site” and “scene” will be jointly referred to as the “investigation site,” unless the particular context requires the use of one or the other word.

#### **27.3 Communications Among Interested Parties.**

**27.3.1 Notice to Interested Parties.** Notification should be given to all known, interested parties in an expeditious manner to allow them the opportunity to examine the scene as early as possible and minimize claims of spoliation. See 11.3.5; see also ASTM E 860, *Standard Practice for Examining and Testing Items That Are or May Become Involved in Product Liability Litigation*. Initial notice should be provided by the entity in control of the scene to any known interested parties.

**27.3.1.1 Entity in Control.** The entity having control of the site should provide notice to all known interested parties if it intends to conduct an investigation at the site of the incident.

If the entity controlling the site does not intend to conduct an investigation at the site, or if it fails to initiate notification, any interested party intending to conduct such an investigation may initiate the notification process.

**27.3.1.2 All Interested Parties.** All interested parties should notify the entity controlling the investigation site in a timely manner of other interested parties that should be included in the investigation. Responsibility for and timing of the notification will vary according to such factors as the jurisdiction, whether the interested party giving notice is public or private, whether criminal conduct is implicated, and applicable laws and regulations. See 11.3.5.1.

## **27.4 Understandings and Agreements.**

**27.4.1 Purposes.** Due to the complexity of the investigation and to ensure that all known interested parties are afforded an opportunity to investigate the incident and protect their respective interests, understandings or agreements should be developed as early as possible. Such understandings or agreements will assist in the coordination of the investigation in an efficient and systematic way, while minimizing disputes. Items on which the parties may wish to have a common understanding or agreement include the following:

- (1) Safety/environmental hazards
- (2) Control and access to the site
- (3) Cost sharing
- (4) Scheduling
- (5) Communication
- (6) Logistics
- (7) Protocols
- (8) Tagging, removal, custody and storage of evidence
- (9) Documentation of the scene/investigation
- (10) Web site
- (11) Interviewing of witnesses
- (12) Sharing of proprietary/nonproprietary information
- (13) Evidence examination and testing

**27.4.2 Scheduling.** Effort should be made to accommodate the schedules of the greatest number of interested parties and their representatives in order to allow them to participate in the investigation. It may not always be feasible to accommodate all interested parties.

**27.4.3 Cost Sharing.** Various aspects of the investigation lend themselves to the sharing of costs. These items may include evidence storage, heavy equipment, debris removal, personal comfort items, security, first aid, and specialized tests or examinations of evidence. The interested parties should identify those aspects of the investigation for which the costs will be shared. A written agreement should be prepared and signed by all interested parties, setting forth the costs to be shared. Interested parties unwilling to share in costs may not receive the benefits of joining in the cost-shared activities.

**27.4.4 Nondisclosure Agreements.** In order to protect confidential, trade secret, and proprietary information, an interested party may require a nondisclosure or confidentiality agreement. These agreements facilitate the sharing of information among interested parties by limiting who may have access to the information.

**27.4.5 Protocols.** Protocols can apply to many aspects of the investigation, including how the scene examination should be conducted and how evidence will be collected, examined, tested, and stored. Interested parties should develop a mutually agreed upon protocol. Any objections to the protocol should be set forth in writing whenever practical, specifying the portion(s) objected to, the reasoning behind the objection, and a recommended alternative procedure.

**27.4.6 Information Sharing.** Information sharing breaks down the barriers to obtaining information by allowing interested parties to exchange factual data. For example, one party may have obtained the public fire report. Sharing this information may help expedite the investigation. Sharing information that does not compromise a party's investigation but will facilitate a swift and cost-effective completion of the investigation is encouraged. Information sharing may also assist in the identification and collection of fire scene evidence.